

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999;
Retransmission Consent Issues

CS Docket No. 99-363

To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION TO SECTION III

EchoStar Satellite Corporation ("EchoStar") hereby submits its comments to Section III of the above captioned Notice of Proposed Rule Making ("NPRM").¹ Section III of the NPRM concerns the provision of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")² instructing the Commission to implement rules and procedures governing broadcasters' election of must-carry or retransmission-consent status for satellite carriage. In offering these comments, EchoStar emphasizes that it fully reserves its view that, in contrast with

¹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues*, CS Docket No. 99-363, Notice of Proposed Rule Making, FCC 99-406 (rel. Dec. 22, 1999) ("NPRM").

² Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including SHVIA, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA")) (codified in scattered sections of 17 and 47 U.S.C.).

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cable must-carry, the statutory satellite must-carry requirement is an unwarranted and excessive restriction on the satellite carriers' First Amendment rights.

Indeed, in promulgating satellite election rules, the Commission should take into account the same fundamental differences between satellite and cable must-carry that make satellite must-carry constitutionally indefensible: broadcast stations do not need to be protected from the market power of satellite carriers for the simple reason that satellite carriers do not have market power; and must-carry is more onerous for satellite carriers because carrying one local station in one local market requires the devotion of nationwide capacity. These differences suggest the need for a separate body of election rules customized to satellite must-carry and to the particular burdens confronted by satellite carriers seeking to comply with the statutory requirement.

Unlike cable must-carry, the SHVIA's requirement is triggered by the *request* of the broadcast station seeking carriage. This latter provision suggests a requirement of an affirmative request, meaning that the Commission should not apply here the cable rules' presumption of must-carry election where the broadcaster fails to act. EchoStar recognizes that the Commission enacted this provision to protect cable operators in case a television station were to try to hold out and withhold consent having failed to exercise its election rights. No less protection should be available to satellite carriers. At the same time, the default must-carry election rule might create an untenable situation for a satellite carrier in light of the burdens caused by satellite must-carry. To alleviate that risk the Commission should rule that, where a broadcaster has failed to make a timely carriage request at the election time, the satellite carrier should be entitled to ascribe to the broadcaster whichever election would best facilitate the

satellite carrier's formidable task of providing consumers with local-into-local retransmission while trying to comply with extremely onerous must-carry requirements.

Moreover, satellite election rules should reflect the fact that satellite carriers lack market power and that bargaining power with respect to local-into-local retransmission is squarely on the side of at least some broadcasters. This very different balance of power warrants a rule whereby commonly owned or controlled broadcast stations should not be allowed to make inconsistent elections. Otherwise, powerful broadcaster groups would be able to "cherry-pick" and select carriage depending on their view of how much leverage they have with respect to each particular station. Such a tactic would stray far afield from the original intent of the must-carry rules -- to protect broadcasters from the leverage exercised by a distributor.

For similar reasons, the Commission should promulgate rules analogous to the cable must-carry requirement of making consistent elections in overlapping franchise areas.³ This rule had the salutary effect of preventing broadcasters from undermining, for example, an over-builder's efforts to compete with an incumbent cable operator. In light of the different balance of power as between broadcasters and satellite carriers, the need for such a rule here is even greater. Because the service area of satellite carriers overlaps that of all other Multichannel Video Programming Distributors ("MVPD"s) in the nation, a broadcaster should be barred from making an inconsistent election as between a satellite carrier and any other MVPD.

³ 47 U.S.C. § 325(b)(3)(B) ("If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems."); 47 C.F.R. § 76.64(g) (1998) ("If one or more franchise areas served by a cable system overlaps with one or more franchise areas served by another cable system, television broadcast stations are required to make the same election for both cable systems.").

Finally, satellite must-carry applies only to local markets where the satellite carrier provides local-into-local service. Accordingly, the election rules should apply only to those markets where the satellite carrier has started, or will soon start, to provide local service.

I. THE COMMISSION SHOULD DEVELOP A SEPARATE REGULATORY FRAMEWORK WITH CUSTOMIZED RULES AND PROCEDURES FOR SATELLITE MUST-CARRY/RETRANSMISSION-CONSENT ELECTIONS

The Commission asks how best to implement Section 325(b)(3)(C)(i), which requires the Commission to adopt regulations establishing election time-periods and procedures for must-carry/retransmission-consent elections.⁴ Specifically, the Commission requests comment on whether to implement the satellite election rule using the rules and procedures adopted for the cable industry elections,⁵ or if a “different election cycle with different procedures” is required to appropriately implement the law.⁶ EchoStar urges the Commission to develop a separate regulatory framework with customized rules and procedures in order to properly implement Section 325. Satellite carriers differ from cable operators in several crucial respects, and cookie-cutter regulations developed for the cable industry would not sufficiently take account of the unique aspects of must-carry/retransmission-consent elections in the satellite industry.

⁴ NPRM, ¶ 13.

⁵ Section 325 of the 1992 Cable Act provides that every three years television broadcast stations must elect whether to proceed under the “must carry” rules or to govern their relationship with cable operators or other multichannel video programming distributors by electing “retransmission consent.” 47 U.S.C. § 325(b)(3)(B).

⁶ NPRM, ¶ 13.

As the Commission is aware, the cable must-carry rules narrowly survived constitutional scrutiny, and then primarily because of the bottleneck characteristics of cable, compounded by the fact that cable operators controlled programmers that might be viewed as competing against broadcasters, as well as because they were found not to be unduly burdensome for cable operators.⁷ EchoStar believes that these constitutional justifications are completely absent in the case of satellite must-carry, and reserves the right to pursue that view in an appropriate proceeding. In any event, the same differences between cable and satellite distributors that make satellite must-carry laws indefensible suggest the need for a separate body of election rules for satellite carriage.

First, satellite carriers lack the market power wielded by cable operators, as the Commission reconfirmed only recently in its *2000 Competition Report*.⁸ Nor do satellite carriers control any cable programming that might have provided them with an incentive to discriminate against broadcasters. Therefore, election rules from the cable must-carry regime that may have been intended to protect broadcasters from the exercise of leverage by the distributor simply have no place here.

⁷ See *Turner Broadcasting, Inc. v. F.C.C.*, 520 U.S. 180, 197-224 (1997) (“*Turner II*”) (holding that must-carry provisions are constitutional as applied to cable carriers where, among other things, substantial evidence supported determination that cable operators had considerable market power or bottleneck characteristics and that the burden on them from must-carry was not unduly great).

⁸ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230 (rel. Jan. 14, 2000), at ¶ 7.

Second, must-carry rules are much more onerous for satellite carriers than for cable systems. To add one local channel in any one local market, EchoStar must currently dedicate one channel's spectrum equivalent throughout the country. Each additional local signal would require the dedication of cumulative nationwide capacity on EchoStar's nationwide system; thus, an additional channel for each of 10 cities would require 10 dedicated channels nationwide. Local cable systems are able to meet local must-carry requirements because the system must only dedicate a small portion of the network's channels. A satellite carrier wishing to provide local retransmissions, on the other hand, is obligated to provide service for all stations electing must-carry status in all of the local areas served by local retransmissions. Applying the must-carry requirement to EchoStar is comparable to forcing a national cable company to provide every local channel available on any one of its local networks to every subscriber nationwide, thereby utilizing hundreds of channels for local broadcasting. Even then, however, the burden is not truly comparable, since the cable company is not further required to scramble all local channels nationwide and unscramble them only in the local areas where they originated, a burden imposed on the satellite carrier alone because of the limits of its copyright licenses.

These excessive burdens would ultimately affect the consumer. Satellite operators would simply have to refrain from extending their offering of local channels to additional local markets, and SHVIA would fall short of its goals. The Commission should implement the must-carry/retransmission-consent elections in a manner that helps alleviate the satellite carriers' excessive burden from must-carry provisions and avoid transplanting rules from the cable area that may further exacerbate it.

II. IF THE BROADCAST STATION DOES NOT EXERCISE ITS RIGHTS, THE SATELLITE CARRIER SHOULD BE ENTITLED TO ASCRIBE AN ELECTION TO THE BROADCAST STATION

In contrast with cable must-carry, the SHVIA must-carry obligation is triggered by the *request* of the broadcast station seeking carriage.⁹ This latter provision suggests a requirement of an affirmative request, meaning that the Commission should not apply here the cable rules' presumption of must-carry election where the broadcaster fails to act. EchoStar recognizes that the Commission enacted this provision to protect cable operators in case a television station were to try to hold out and withhold consent having failed to exercise its election rights.¹⁰ No less protection should be available to satellite carriers. At the same time, the default must-carry election rule might create an untenable situation for a satellite carrier in light of the burdens caused by satellite must-carry. To allocate that risk the Commission should rule that, where a broadcaster has failed to make a timely carriage request at the election time, the satellite carrier should be entitled to ascribe to the broadcaster whichever election would best facilitate the satellite carrier's formidable task of providing consumers with local-into-local retransmission while trying to comply with extremely onerous must-carry requirements.

⁹ The 1992 Cable Act states in relevant part that "[e]ach cable operator **shall carry**, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations" 47 U.S.C. § 534(a). The SHVIA, by contrast, provides that "each satellite carrier . . . shall carry **upon request** the signals of all television broadcast stations located within that local market, subject to section 325(b)." SHVIA § 1008 (to be codified in 47 U.S.C. §338).

¹⁰ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3002 (1993) ("Report & Order") (stating that a television broadcaster that does not bother to make an election "could leave a cable operator without any means of acquiring access to a signal for its subscribers. Choosing must-carry as the default would solve this problem.").

III. THE ELECTION RULES SHOULD APPLY ONLY TO THE RELEVANT MARKETS

The satellite must-carry requirement applies only to local markets where the satellite carrier already provides local-into-local retransmissions.¹ To avoid wasteful paperwork, the Commission should therefore implement a mechanism whereby the election rules should apply only to those markets where the satellite carrier has started, or will soon start, to provide local service.

IV. THE COMMISSION SHOULD REQUIRE BROADCAST COMPANIES AND THEIR OWNERS TO MAKE CONSISTENT ELECTIONS

The Commission seeks comment on how the consistent election requirement of Section 76.64(g) would be implemented in a must-carry/retransmission-consent election in which satellite carriers were involved.¹¹ Currently, the regulations require that broadcasters make **consistent** must-carry/retransmission-consent elections where franchise areas of cable systems overlap.¹² This rule had the beneficial effect of preventing broadcasters from undermining, for example, an over-builder's efforts to compete with an incumbent cable operator.¹³ In light of the different balance of power as between broadcasters and satellite carriers, the need for an analogous rule here is even greater. Moreover, such a rule should be extended to accommodate the national nature of satellite carriers.

¹¹ NPRM, ¶ 13.

¹² 47 C.F.R. § 76.64(g); NPRM, ¶ 13.

¹³ Report & Order, 8 FCC Rcd. at 3002 ("The legislative history makes it clear that this provision applies to cable systems that compete with one another, i.e., overbuilds.").

As the service area of satellite carriers covers the entire nation, it “overlaps” the areas of all other MVPD serving any part of the country. For this reason, analogous treatment of satellite carriers and cable operators with respect to inconsistent elections requires a rule that a broadcaster may not make inconsistent elections as between a satellite carrier and any other MVPD. Thus, under that rule a broadcaster electing must-carry treatment with EchoStar would be barred from electing retransmission-consent status with DirecTV, and a broadcaster electing must-carry treatment with a cable operator would be prohibited from electing retransmission-consent treatment with a satellite carrier.

Moreover, the satellite election rules should reflect the fact that satellite carriers lack market power and that bargaining power with respect to local-into-local retransmission is squarely on the side of at least some broadcasters. This very different balance of power warrants a rule whereby commonly owned or controlled broadcast stations should not be allowed to make inconsistent elections. Otherwise, powerful broadcaster groups would be able to “cherry-pick” and select carriage depending on their view of how much leverage they have with respect to each particular station. Such a tactic would stray far afield from the original intent of the must-carry rules -- to protect broadcasters from the leverage exercised by a distributor.

V. CONCLUSION

In light of the unique aspects of satellite services, EchoStar urges the Commission to develop a separate regulatory framework with customized rules and procedures for satellite must-carry/retransmission-consent elections. This regulatory framework should, among other things, require broadcasters to make consistent elections for competing distributors and entitle satellite carriers to ascribe an election to a broadcast station that fails to exercise its rights in a

timely and procedurally appropriate fashion.

Respectfully submitted,

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Dated: February 1, 2000

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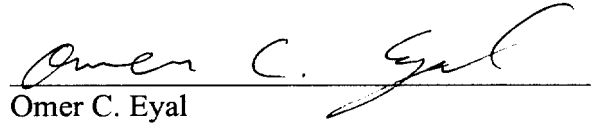
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